country do not depart from the general rule allowing the vendee to recover substantial damages. *Hopkins* v. *Lee*, 6 Wheat. (U. S.) 109. In England, however, an exception is made in such contracts if the vendor, whether in good or bad faith, refuses to perform because he has no title; for he is then liable only in nominal damages. *Bain* v. *Fothergill*, L. R. 7 H. L. 158. The same rule prevails in Pennsylvania. *Burk* v. *Serrill*, 80 Pa. 413. In a few states nothing less than fraud, bad faith, or misconduct, subjects the vendor to liability in substantial damages. *Margraf* v. *Muir*, 57 N. Y. 155. In others, however, mere knowledge by the vendor of his inability to give good title makes him so liable. *Plummer* v. *Rigdon*, 78 Ill. 222. The English doctrine was early applied to a contract for the sale of a term for years. *Pounsett* v. *Fuller*, 17 C. B. 660. And the reasons given for its establishment apply with equal force to the present decision which brings within the rule a contract for the sale of a *profit à prendre*. See *Bain* v. *Fothergill*, *supra*.

DAMAGES — MEASURE OF DAMAGES — SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACT. — A, having substantially performed a building contract, sued B for the agreed price. B counterclaimed for defects in performance. *Held*, that the measure of the defendant's compensation is the reasonable cost of remedying the defects that are practically remediable, and such further sum as will measure the actual diminished value of the structure because of defects not so remediable. *Forller* v. *Heintz*, 118 N. W. 543 (Wis.).

Although modern cases generally allow a recovery on a building contract substantially performed, there has been no consistent rule in measuring compensation to the owner for defects. The measure has been stated to be the difference in value between substantial performance and perfect performance. *Wagner* v. *Allen*, 174 Mass. 563. Also the defendant's compensation has been computed from damage sustained by reason of the defects. *Kane* v. *Stone Co.*, 39 Oh. St. 1. But as there may be no difference in value and no actual damage, the owner might get no compensation whatever, although not getting what he contracted for. Where the owner is allowed what would make good all defects in performance a fairer result is reached. *Feeney* v. *Bardsley*, 66 N. J. L. 239. This is an application of the first part of the Wisconsin rule. But if remedying a slight defect would entail a grossly disproportionate expense the contractor would have only a barren recovery. In such circumstances the latter part of the Wisconsin rule would apply. On the whole, the rule in the principal case would seem to work justice everywhere.

EMINENT DOMAIN — COMPENSATION — RESERVATION OF CLAIM FOR INJURIES TO STRUCTURES. — A leased from B two lots upon which he erected structures for an entire plant. On condemnation of one lot for public purposes A surrendered his lease to B with all claims for damages except such as he had by reason of injuries to structures on the remaining lot. In the condemnation proceedings A claimed the damages so reserved. *Held*, that he may recover. *Matter of City of New York*, 193 N. Y. 117.

On condemnation of land by eminent domain proceedings, the compensation is apportioned between the landlord and the tenant according to their interests. *Dyer* v. *Wightman*, 66 Pa. St. 425. See *Harris* v. *Howes*, 75 Me. 436. And where part of an entire tract is taken the measure of damages includes the resulting diminution in value of the residue. *South Buffalo Ry. Co.* v. *Kirkover*, 176 N. Y. 301. Thus it has been held that a lessee may recover for diminution in value of his leasehold and fixtures through condemnation of a portion of the property. *Phila., etc., R. R. Co.* v. *Getz*, 113 Pa. St. 214. In the present case the surrender prevented any damage in respect to the leasehold. But the reservation of the claim for damages to the structures is in effect an agreement that their title shall remain in the former tenant. Hence compensation for their depreciation is rightly awarded him. Because easements are regarded as inseparable from the dominant estate, a grantor, in spite of a reservation in his deed, cannot recover damages for their invasion after the grant. *McKenna* v. *B. U. El. R. R. Co.*, 184 N. Y. 391. But recovery can be had for

damage incurred before conveyance. *Pegram* v. *N. Y. El. R. R. Co.*, 147 N. Y. 135.

EMINENT DOMAIN — COMPENSATION — VALUATION OF SPECIAL ADAPTABILITY OF LAND TAKEN. — A water board having obtained statutory powers for the construction of a reservoir, determined to take the claimant's land, which was especially adapted for reservoir purposes. The land could not have been so used by other possible competitors without their first obtaining parliamentary powers. *Held*, that the special adaptability may be considered as an element of value, but it is the contingent value due to the possibility of the land's coming into the market that is considered and not the value of the realized possibility, due to the fact that the promoters have obtained statutory powers. *In re Lucas & Chesterfield Gas and Water Board*, [1909] 1 K. B. 16.

The market value is the proper test of compensation for land taken by eminent domain. *City of Santa Ana* v. *Harlin*, 99 Cal. 538. Everything which gives the land intrinsic value should be taken into consideration. *Shenango & Allegheny R. R. Co.* v. *Braham*, 79 Pa. St. 447. So a special adaptability to any particular purpose is relevant provided there is a contingent possibility that the property will be put to that use. *Boom Co.* v. *Patterson*, 98 U. S. 403. It is always a question, however, whether this contingent possibility in fact exists. The court seems right in holding that its existence is not prevented by the need of further statutory powers. But when the special value exists only for the particular purchaser who has the compulsory powers, it is not to be considered. See *In re Countess Ossalinsky & Manchester Corporation*, Q. B. D. 1883; BROWN AND ALLAN, LAW OF COMPENSATION, 2 ed., § 659. To consider it then would be to test the compensation by the value to the buyer — the realized possibility. On the other hand, where the special value exists also for other possible purchasers, so that there is a real though limited market, then, even though there are at the moment no competitors, there is a real contingent possibility, which is universally considered an element of value. *In re Gough & Aspatria, etc., Water Board*, [1904] 1 K. B. 417.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ENJOINING STATE COMMISSION FROM ENFORCING RAILROAD RATES. — A state commission was established with power to fix and enforce railroad rates, subject to review on appeal to the highest state court. Without appealing thereto, the plaintiff railroad sued the commission in the federal court to restrain the enforcement of a rate alleged to be confiscatory. *Held*, that the bill should be retained to await the result of an appeal to the highest state court. *Prentis* v. *Atlantic Coast Line Co.*, U. S. Sup. Ct., Nov. 30, 1908. See NOTES, p. 368.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — POWER OF COURT OF BANKRUPTCY TO RETAIN POSSESSION OF BANKRUPT'S PROPERTY. — A bankrupt corporation had in its possession show-cases purchased from the defendant in error, the price for which had not been paid. On the bankruptcy of the company, the court appointed the plaintiff in error receiver of the bankrupt's property and he took possession of all the property including the show-cases. The defendant in error, claiming that the title to the show-cases had never passed to the bankrupt, sued out a writ of replevin in the state court and got judgment. The receiver brought a writ of error to the U. S. Supreme Court. *Held*, that the judgment be reversed. *Murphy 2d* v. *Hofman Co.*, U. S. Sup. Ct, Jan. 4, 1909.

For a discussion of the principles involved, see 21 HARV. L. REV. 433.

GARNISHMENT — EFFECTS OF GARNISHMENT — LIABILITY OF SURETY FOR INTERFERENCE WITH GARNISHEE'S CONTRACT. — A entered into a contract with B by which B agreed to mill and sell A's rice crop. C brought suit against A and garnished B. B stopped milling, believing he had no authority to proceed with the contract. C lost his suit against A. As C was insolvent A sued D, the surety on the garnishment bond, claiming damages for interference with